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No. 08-316

In the Supreme Court of the United States

UNITED STATES OF AMERICA EX REL. MOUNTHASONE BOTT; UNITED STATES OF AMERICA EX REL. SUSAN NEWMAN,
Petitioners,

v.

SILICON VALLEY COLLEGES; WESTERN CAREER COLLEGES; GREG NATHANSON; ELLIS C. GEDNEY; DARRYL LINDSEY; ALMICH & ASSOCIATES,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR REHEARING

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ISSUE

The Ninth Circuit erred in holding that defendants are entitled to claim good faith reliance on 34 C.F.R. § 668.14(b) (22) (ii) (A) (Nov. 1, 2002).

FACTS

The Career College Association, the trade association representing the for-profit education industry, presented false testimony to the U.S. House of Representatives in order to obtain passage 107 H.R. 1992 in 2001. H.R. 1992 sought to amend 20 U.S.C. 1094(a)(22). Passage of said bill would have served to exonerate members companies from massive liability in lawsuits then pending seeking the recovery of $500 million in federal student financial aid paid by the U.S. Government. The November 26, 2001 letter from U.S. Congresswoman Patsy Mink to Senator Edward Kennedy pointed out the misconduct that had occurred by concealment of the existence of these lawsuits in the testimony given before Congress. *See*, Apx. 1: "HR 1992 passed the House on October 10, 2001. I was the principal opponent for all the reasons stated in the debate. Scott D. Levy's letter to me reveals certain very disturbing matters that compromise the enactment of HR 1992 at this time."

In holding that defendants were presumed to be in good faith reliance on the subsequently passed safe harbor regulation[1], the Ninth Circuit decision failed to address the misconduct that occurred in the passage of 107 H.R. 1992 clearly spelled out in Congresswoman

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[1] 34 C.F.R. § 668.14(b) (22) (ii) (A) (Nov. 1, 2002).

Mink's letter to Senator Kennedy. There should be no reward for lying to Congress. There is absolutely no mention in the Career College Association's testimony of these massive lawsuits against its membership. "I am appearing today on behalf of the Career College Association (CCA) and their 963 members." Apx. 3a. "The 963 members of the Career College Association enthusiastically support the concepts in HR 1992. We have included with this testimony suggested report language that we believe will help to further clarify the intent of the incentive compensation provision." Apx. 6a, Testimony of Omer Waddles, "H.R. 1992, the Internet Equity and Education Act of 2001" Committee on Education and the Workforce Subcommittee on 21st Century Competitiveness June 20, 2001.

ANALYSIS

"[T]he Secretary's decision is entitled to a presumption of regularity. [internal cites omitted]. But that presumption is not to shield this action for a thorough, probing, in-depth review." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971). In conducting this review, the court "shall ... hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law." 5 U.S.C. 706.

CONCLUSION

There should be a thorough, probing, in depth review of the legislative events surrounding the passage of HR 1992 before any defendant receives the

benefit of the presumption that reliance on the regulation was in good faith. The Ninth Circuit decision completely disregarded this misconduct before Congress even though it was brought to the Court's attention.

Respectfully Submitted,

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CERTIFICATION

The foregoing is restricted to the grounds specified in 44.2 Sup. Ct. R. and it is presented in good faith and not for delay.

Scott D. Levy

Scott D. Levy
Counsel for Petitioners

APPENDIX

APPENDIX 1

[Letterhead]

Patsy T. Mink
Congress of the United States
2nd District, Hawaii

November 26, 2001

The Honorable Edward M. Kennedy
Ranking Member
Committee on Health, Education, Labor and Pensions
U.S. Senate
315 Russell Senate Office Building
Washington DC 20510

Dear Senator Kennedy:

I am referring the enclosed to your attention as matter pending before your Senate Committee.

HR 1992 passed the House on October 10, 2001. I was the principal opponent for all the reasons stated in the debate.

Scott D. Levy's letter to me reveals certain very disturbing matters that compromise the enactment of HR 1992 at this time.

It would be very critical that these matters of conflict with governmental efforts to recover over $500 million in federal student aid be scrutinized carefully.

Another case seeks $187 million repayment of student financial aid money against CLC Computer Learning Center.

These lawsuits raise very serious questions as to the propriety of moving forward on legislation that clearly goes to the conduct under question.

Very truly yours,

/s/
PATSY T. MINK
Member of Congress

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APPENDIX 2

Committee on Education and the Workforce
Hearings

http://republicans.edlabor.house.gov/archive/hearings/107th/21st/web62001/waddles.htm

Testimony of Omer Waddles

"H.R. 1992, the Internet Equity and
Education Act of 2001"
Committee on Education and the Workforce
Subcommittee on 21st Century Competitiveness
June 20, 2001

Executive Summary

Mr. Chairman and members of the Committee, thank you for this opportunity to come before the Committee to voice our support for H.R. 1992, The Internet Equity and Education Act of 2001. I am the Executive Vice President of ITT Educational Services, Inc. I am in charge of overseeing the operations for our 70 ITT Technical Institutes in 28 states with approximately 29,000 students. We provide career-focused, degree programs in the areas of technology.

I am appearing today on behalf of the Career College Association (CCA) and their 963 members.

The business processes in all industries have some form of information component, thereby requiring

those industries to require information technology specialists and other members of a "technology literate" workforce. To ensure that the nation remains competitive in the global economy, higher education institutions must respond to the increasing need for technology literate workers in their program design.

Complicating the situation are changes in the workforce. The current workforce already has difficulty finding time to upgrade skills and knowledge while working and attending to family needs. Even greater productivity pressures will occur when the large "baby boomer" cohort begins to turn age 62 and retire in 2008.

To ensure a sufficient technologically literate workforce, higher education will have to develop programs that are designed around the specific needs of three groups: current workers, retired boomers and disadvantaged or minority groups that are currently under-represented in the workforce. These groups each have different priorities and criteria that will affect the design of programming if it is to meet their respective needs.

Higher education institutions have turned to non-traditional methods of educational programming in recent years to try to meet these differing needs. Generally, educational programming has been changed to allow it to be accessed either in the home or in other physical locations convenient to the student. Program calendars have become more flexible to assist workers with issues such as heavy work demands or travel schedules. To better serve the workforce, this trend must be extended.

The spirit of the Higher Education Act of 1965, as amended, was to increase student access to education. That spirit is even more important today as we face workforce changes. Several Department of Education regulations, created prior to the recent technology and economic trends, have outlived their original intent and have as a by-product a punitive effect on students who prefer non-traditional educational programming and scheduling. These students do not have equal access to financial aid, as do students of traditional in-class programs.

HR 1992 includes proposed remedies to some of these challenges by:

- Reducing the burden of the online 50-percent rule and allowing financial aid to be provided to students who are attending schools with default rates below 10% but have more than 50% of their programs available online;

- Eliminating the 12-hour rule and stipulating that traditional and non-traditional programs should be held to the same attendance criteria.

HR 1992 also provides needed guidance on the subject of compensation of employees involved in recruiting or providing student financial aid. It clarifies that incentive compensation restrictions apply only to *non-sal*ary payments to those *directly* involved in either of these two activities.

The 963 members of the Career College Association enthusiastically support the concepts in HR 1992. We

have included with this testimony suggested report language that we believe will help to further clarify the intent of the incentive compensation provision.

I. Education Issues in Workforce Development

Dot-com meltdowns have captured the popular press, but the real impact of the information technology evolution is "Act Two" of the New Economy. This is being seen in the depth of the change that has taken place in the traditional sectors of the full economy. According to the Information Technology Association of America (ITAA) over 90% of the IT jobs are being created in these traditional businesses. That is because business processes in all industries have some information creation or exchange component, and the improved efficiencies related to the streamlining of these business processes should be a top priority of the nation to insure our continued business competitiveness.

As the Department of Commerce reported in "Digital Economy 2000," information technology is being used to improve design and engineering, conduct R&D, reduce development time, simplify manufacturing, manage inventory, facilitate training, improve customer service and reduce costs. According to Commerce, "Although IT industries still account for a relatively small share of the economy's total output—an estimated 8.3 percent in 2000—they contributed nearly a third of real U.S. economic growth between 1995 and 1999." Clearly IT has become an engine for the creation of economic activity and business growth.

Demand for information technology workers is anticipated to continue as more industries integrate the Internet and its protocols into their internal business processes. The Bureau of Labor Statistics predicts that, between 1998 and 2008, the number of computer support specialists will have increased by 102 percent and database administrators by 77 percent. The Information Technology Association of America's study found that 425,000 IT jobs would go unfilled this year alone. Another estimate came from the consulting firm META Group and their estimate claimed that those unfilled information technology jobs would number at least 600,000. In addition, the META Group also found a widening salary gap. This occurs as technology workers' salaries are continuing to increase at a faster rate than their non-technology related counterparts.

In past decades it was the presence of or lack of, of material or financial assets that dictated the level of success of a business endeavor. Today it is the presence or lack of, of human intellectual capital that is the proven predictor of success. The obvious conclusion is that we must do everything we can to nurture the development of information technology workers and a "technology literate" workforce if we, as a nation want to insure our continued competitive abilities. We must make good on the traditional promise of real *"access to quality"* education for all those who seek it.

In its report "A Nation of Opportunity," the 21st Century Workforce Commission stated, "Many IT jobs require, at a minimum, an associate's degree and/or specific postsecondary school certifications attained through specialized technical training. A large

percentage of IT jobs require a postsecondary education degree, with rigorous computer science and engineering degree programs representing the primary path to the Core IT Professions. These requirements reflect general labor market trends in which a premium is placed on advanced education and training."

We, as educators, must respond to this critical need by providing current and future programs that will develop a technologically literate workforce.

Workforce Challenges

However, there are other workforce issues looming before us in the coming decades. "Baby boomers," the largest—and most educated—population cohort the nation has ever seen, is about to enter retirement. How will industry respond to this societal shift that will further deplete the available workforce?

One obvious effect will be increased productivity pressures on the remaining, smaller workforce. This smaller group of workers is the same ones that the Department of Labor predicts will move through at least five different careers during their working years. Preparation for five careers certainly will mean the need for continuous acquisition of new knowledge and skills. Lifelong learning will become a living necessity to these workers. Their career and changing employers will demand easy access to our previously mentioned learning opportunities. These customers are already demanding that they have more choices with regard to the delivery, style and content of these educational services. They want these products delivered when and

where they choose not in the traditional manner where the institution chooses the means and methods.

Another response industry may take is to provide incentives for the "Boomer" cohort to remain in or re-enter the active workforce. An AARP study found that many of today's aging workers are very receptive to this idea of retention or reengagement of employment. Eighty percent of the workers surveyed in this "Boomer" population expect to work at least part-time in retirement. The Bureau of Labor Statistics projects that the workforce participation rate for those aged 55 and older will rise to 36.8 percent by 2008, the year in which the oldest "Boomers" will turn 62. That is a 5.5 percent increase over the actual 1998 participation rate.

Additional qualitative studies also indicate that in order to be attractive to "Boomers" the job they would consider returning to must be intellectually challenging and has some form of financial security. Phoenix-based retirement community developer Del Webb Corporation has scrapped plans for shuffleboard courts and replaced them with computer labs and college classrooms in their facilities. To continue to play an important role in evolving technology and the new economy, "Boomers" will require their own access to quality education and will choose in many cases to define it for themselves. To keep this valuable working resource engaged and up-to-date employers must continuously upgrade the "Boomer's" array of technology skills.

A third response industry and the nation should undertake to shore up the technology literate workforce is to insure access for those groups currently

under-represented: women, minorities, those with physical disabilities, and the economically disadvantaged in our cities and rural areas. These diverse groups are in the greatest need of more choices in their menu of training and education. We no longer can afford to let them sit on the sidelines of today's industry. We need their active participation in all aspects of this complex working world. These programs that are designed to work with each group's unique needs must include the same commitment to access and quality that we want for all programs.

Challenges for Educators

So the burden falls on educators representing all types of institutions to step up their ability to meet this challenge. One thing we should be able to agree on is that increasing the educational attainment of our citizenry is a better long-term investment than the temporary solutions that include importing short-term Band-Aid help with the use of visas and work permits. Business understands the importance of having the workforce available at a moment's notice. This requires investment in the people we can see and touch today and those who are being trained currently for tomorrow's needs.

What do we, as education providers, have to consider as we design programming to meet the demand for technology literate workers? Here just a few of the problems we currently face:

- More than 40 percent of full-time postsecondary students already work either part- or full-time.

- Increasing numbers of full-time workers are returning to school to improve skills or change careers.
- The younger cohorts working full-time find it increasingly difficult to balance work, family life and the desire or demand for more education.
- Working parents have difficulty in arranging childcare so they can attend class.
- Workers and retirees alike resist commuting to classes.
- Potential students in economically disadvantaged areas lack transportation to class and support from their families.
- Potential students in rural areas are too far from classes.
- Potential students whose parents did not have postsecondary education may lack the confidence or motivation to embark on a postsecondary program for themselves.

Is it any wonder, then, that higher education has begun to utilize a number of "non-traditional" methods and settings to make educational offerings available? The National Center for Educational Statistics found that in the 1997-98 school year, almost 44 percent of all higher education institutions offered distance-based courses, an increase of one third from just three years earlier. Enrollment in postsecondary distance education courses more than doubled during that time, to 1.6 million students nationwide. The research firm, International Data Corporation, estimates that 2.2 million students are expected to enroll in online courses by 2002.

Like the new economy, distance learning can not go away. Use of techniques including non-classroom sites,

collaborative study, independent learning, on-the-job programs and distance learning programs help students, especially working adults, overcome many of the barriers I have listed that face students today.

II. HR 1992 Increases "Access to Quality" in Education

What many institutions of higher education need, in order to fulfill our important role in retooling the workforce, is the ability to be flexible enough to design programs that meet the varying needs of students, and to do so with the most efficient operation possible. The critical role of the oversight triad of state and federal government and the accrediting agencies is to ensure the quality of the programs that are made available and the administrative capability of the institutions. What is not effective is the use of narrow and artificial barriers that fail to focus on the quality of the product and only address the process. It is the student who gets lost in the battle between quality and process.

It was the original intent of the Higher Education Act of 1965, as amended, to increase students' access to quality in postsecondary education. Pursuing that original intent is even more important today as education plays an increasingly important role in helping our workforce to stay competitive in an ever-changing global economy. We acknowledge that the pre-eminent concern of the Department of Education has been to insure the quality and reliability of educational programs. However, we do believe the role of the Department of Education should not be solely focused on determining what type of programs are most effective or are believed to be the most accepted or desirable. Instead we suggest the Department

should be fostering an environment in which higher education institutions have the flexibility to develop many types of programs targeted at accommodating the increasingly wide array of needs of students.

A number of the regulations promulgated by the Department of Education over the past three and one-half decades have outlived their original intent and applicability to today's needs and demands. The learning environment of the global economy is demanding more of us than what we placed on the books in the seventies and eighties. The legislation we are commenting on today, H.R. 1992, helps us all begin a new journey targeted at ensuring the same things we have wanted since 1965. It helps us to focus on how best to provide to our nation's students access to educational services that meet their needs in their own specifically defined educational time and place. Access to not just any program, but programs and providers that meet high levels of quality and effectiveness.

The 50 Percent Rule

For example, the "50 percent rule." This rule was created in response to various concerns about the level of quality in correspondence courses back in the late 1970's and early 1980's. This rule does not reflect the highly effective communications and interactive teaching methods developed for use on the Internet only in the last few years. By offering only reduced financial aid to those pursuing an online education, the rule in effect punishes students who have selected that method because of family, health or location considerations. This not only restricts access, it hampers workforce development in the very types of

technology education and training the country needs most to remain competitive.

Higher education institutions and accrediting bodies have made great progress in creating and recognizing sound technology-based teaching methodologies. In lieu of using the outdated standard of "seat time," the Department should maintain its oversight responsibilities by allowing recognized accrediting bodies to set new and innovative standards that hold education providers accountable.

HR 1992 as proposed provides a sound first step as a remedy for this inequity. It allows institutions to offer more than 50 percent of their courses by telecommunications, thereby supporting access. It also provides barriers of entry to entities that have not previously demonstrated sufficient quality standards by requiring current participation in the student loan program. While doing this we interpret the legislation as not removing the participation of those that are already involved with the current demonstration programs for distance education. In a subsequent section, I will recommend broadening the bright line test of the singular 10% loan default provision to include additional measurements of quality.

The 12-Hour Rule

While initially well intended so as to insure programs comply with a traditional form of quality programming, the result of the non-legislative "12-hour rule" has meant that access by interested students was restricted. Many students have family responsibilities, heavy workloads, travel schedules or other personal factors that prevent them from

attending a traditional classroom program. These same individuals can and do participate in many forms of more flexible educational programs that include features such as self-paced designs, weekend schedules and online components. Accrediting bodies are fully capable of insuring that these programs produce results that are at least equal to those of traditional programs. Some of these newly designed programs require students to meet only once per week. Therefore, the Department should not punish students enrolled in non-traditional programs by allowing them only reduced levels of financial aid.

HR 1992 contains the desirable remedy that requires that traditional and non-traditional programs should be held to the same attendance criteria.

Incentive Compensation

Some in the Department have interpreted the statutory language on compensation of recruiters and financial aid personnel more broadly than we believe Congress originally intended. All institutions, whether not-for-profit or for-profit, must be allowed to utilize standard business management practices in the promotion of their institutions, the enrollment of students and the processing of financial aid. As a result of the over broad interpretation, colleges and institutions are being asked to evaluate and then compensate employees by measuring activities that are not central to their employment. No one is supporting the return to what we saw in the early 1980's where there were some unscrupulous providers who were recruiting individuals out of welfare lines for schools that had no substance or educational value. That is not the case today. We do not have those

headlines, and if we do, every part of the oversight triad is charged with ridding the system of those charlatans. But all of us have to measure our recruiters and financial aid administrators on the work that they are hired to do. To do anything less would not be supporting the basic premise of an honest day's wage for an honest day's work. I think the technical changes included in this bill will help the Department better interpret the intent of the legislation and allow them to avoid the unnecessary narrowing of what is allowed in the area of salary and compensation. To tell a college they can employ a person to be a recruiter or representative but they cannot link the compensation of that individual to their work product would be the same as attempting to tell congressional constituents they cannot consider a candidate's voting record during an election.

The current environment, in which the education community has been given little or no detailed interpretation of the regulation, has constrained us from many times hiring and retaining the personnel we need, utilizing innovative promotion techniques provided by third parties, and with some interpretations, from allowing owners and managers of for-profit colleges to participate in the financial successes of their schools.

HR 1992 makes great strides in clarifying that incentive compensation restrictions apply only to *non-salary* payments to those *directly* involved in recruiting students or awarding financial aid. The bill also creates the structure by which violations are met with appropriate rather than unfairly punitive sanctions.

In summary, HR 1992 provides much needed relief from outdated regulatory constraints and provides greater flexibility to allow institutions to develop educational programming that can meet student needs and to pursue the enrollment of those students in an efficient and effective manner.

III. Recommendations

I am here today on behalf of the 963 members of the Career College Association, representing over one million students, to say that we enthusiastically support HR 1992 as it is written. It contains important reforms that will be beneficial to traditional and non-traditional students alike.

I do have a personal comment with respect to the modification of the 50-percent rule. The bill's current language stipulates that an institution must have a student loan default rate of less than 10 percent for the three most recent years in order to qualify for this waiver of the 50-percent rule. This is a good first step. Two years form now when Congress considers reauthorizing the Higher Education Act, we urge the Congress to consider using other indicators of institutional success. Use of performance factors present a more well rounded picture of the institution and avoid the historic over-reliance upon a single bright line test. By using a single blunt edged tool, we are saying that you are a good distance education provider if you are on one side of the line and you are assumed to be a less effective provider if you are on the other side of the line. Quality is again what we are striving to ensure, not just process.

In addition, CCA asks that you consider adopting our proposed report language to help further clarify the issues related to the incentive compensation provision:

The reference to "other incentive, non-salary payment" clarifies that the statutory prohibition extends only to bonuses, commissions, and similar payments. It does not apply to setting or prospe:tively adjusting salary from time to time, based on performance of legitimate job functions.

The reference to payments "based directly on success" in securing enrollments clarifies that institutions may provide incentive compensation to admissions personnel based on their performance of legitimate recruiting activities that are commonly undertaken by recruiters on behalf of institutions of higher education prior to enrollment and the start of classes. Such activities and practices include, but are not limited to, recruiting visits to high schools or other sources of prospective students; telephone calls and similar communications (including written letters and e-mail) aimed at recruiting prospective students; personal interviews of prospective students; the giving of tours to prospective students; the provision of various academic and general, school-related information to prospective students; and obtaining certain information from prospective students, including but not limited to applications, transcripts, high school diplomas, and other documentation needed to complete an

application to enroll at an institution of higher education.

The change in language also is intended to permit employee, senior manager and owner participation in the profits of the institution or the award of bonuses, stock options or stock based upon the financial performance of the institution.

The reference to persons or entities "directly engaged" in recruiting or awarding financial aid clarifies that the statutory prohibition applies only to those who directly recruit students or award financial aid. It does not apply to supervisors or higher level executives, although they may supervise such persons or be above them in the institution's organizational chart, that do not recruit prospective students or award financial aid. The provision also does not apply to payments to a third party, such as a Web services provider, as long as the employees of the third party are not themselves paid a commission based on success in directly securing enrollments or financial aid."

Thank you for this opportunity to provide testimony to the Committee on this important piece of legislation. We believe that HR, 1992, The Internet Equity and Education Act of 2001, is a needed piece of legislation of which CCA and its member institutions support passage. As I stated earlier, I believe this represents an exciting starting point for the evolution of our laws, rules and regulations in the area of higher education. We need to continue reviewing all aspects of the programs and participants in higher education

to ensure their compatibility with the demands of our changing economy.

Thank you.